No. 77-668

Supreme Court, U. S.
FILED
FEB 15 1978
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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ALABAMA ASSOCIATION OF INSURANCE AGENTS, INC., ET AL., PETITIONERS

*v.*

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 533 F. 2d 224. The first opinion on rehearing (Pet. App. 55a-57a) is not reported. The second opinion on rehearing (Pet. App. 59a-60a) is reported at 558 F. 2d 729. The opinions of the Board of Governors of the Federal Reserve System (Pet. App. 63a-98a) are reported at 1974 Fed. Res. Bull. 596, 39 Fed. Reg. 25548, and 1974 Fed. Res. Bull. 738, 39 Fed. Reg. 33411.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 61a-62a) was entered on June 10, 1976. Petitions for rehearing

were granted in part and denied in part on January 10, 1977 (Pet. App. 55a-57a). A further order revoking part of the January 10 alteration of the initial judgment was filed on September 1, 1977 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on November 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Federal Reserve Board properly determined that the sale of insurance in connection with extensions of credit is "closely related" to banking, within the meaning of Section 4(c)(8) of the Bank Holding Company Act.

2. Whether the Board correctly applied the "public benefits" test of Section 4(c)(8) in determining that the public benefits expected from proposals for the sale of credit-related insurance outweighed any expected adverse effects.

## STATUTE AND REGULATION INVOLVED

1. Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended, 84 Stat. 1765, 12 U.S.C. 1843(c)(8), provides that a bank holding company may acquire:

> shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains



> in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. * * *

2. Section 225.4(a)(9) of Federal Reserve Board Regulation Y, 12 C.F.R. 225.4(a)(9), provides that activities closely related to banking or managing or controlling banks include:

> acting as insurance agent or broker in offices at which the holding company or its subsidiaries are otherwise engaged in business (or in an office adjacent thereto) with respect to the following types of insurance:
>
> * * * * *
>
> (ii) Any insurance that (*a*) is directly related to an extension of credit by a bank or a bank-related firm of the kind described in this regulation, or (*b*) is directly related to the provision of other financial services by a bank or such a bank-related firm * * *.
>
> * * * * *

## STATEMENT

Section 4(c)(8) of the Bank Holding Company Act authorizes the Federal Reserve Board to approve applications by a bank holding company to engage in certain nonbank activities that are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." Section 4(c)(8) thus calls for the Board to determine whether a proposed activity is "closely related" to banking and whether the performance of the proposed activity by the subsidiary of a particular bank holding company would be a "proper incident" to

banking by producing benefits to the public that outweigh its possible adverse effects.[1]

In 1972 Southern Bancorporation of Birmingham, Alabama, and First National Holding Corporation of Atlanta, Georgia, sought approval to write or sell property damage and liability insurance when the insurance was related to extensions of credit. Petitioners, various organizations and insurance agents, opposed the applications. An administrative law judge conducted extensive hearings on the applications and issued separate opinions recommending limited approval of each application (Pet. App. 99a-140a). The Board then reviewed the administrative record and determined that property damage and liability insurance sales directly related to an extension of credit are proper under 12 C.F.R. 225.4(a)(9)(ii)(*a*), and that the public interest favored approval of the proposals (Pet. App. 63a-98a).

The court of appeals sustained Section 225.4(a)(ii)(*a*) and (*b*) on its face (Pet. App. 22a)[2] and held that the Board properly applied its regulation to permit property damage and liability insurance sales that are related to extensions of credit (*id.* at 30a-34a). The court also concluded that the Board had correctly applied the "public benefits" test of Section 4(c)(8) and that substantial evidence supported the Board's determination that the expected public benefits of the proposed credit-

[1]The Board has determined by regulation that a number of specified activities are "closely related" to banking within the meaning of Section 4(c)(8). See 12 C.F.R. 225.4(a).

[2]The court struck down certain provisions of 12 C.F.R. 225.4(a)(9) that are not in issue here (Pet. App. 30a).



related insurance activities outweigh their possible adverse effects (Pet. App. 34a-48a).[3]

## ARGUMENT

Petitioners' principal contention (Pet. 12) is that the courts of appeals do not agree on the meaning of Section 4(c)(8) of the Bank Holding Company Act. Petitioners are wrong.[4] The Board's decisions, and that of the court of appeals here, are supported by both the text and the legislative history of the governing statute, and there is no reason for review by this Court.

1. The court of appeals concluded that an activity is "closely related" to banking at least when it is tied to extensions of credit, when banks are particularly well situated to provide the service, or when banks traditionally have provided the service (see Pet. App. 23a-24a). Banks often have provided insurance services, and, acting under the predecessor to Section 4(c)(8), the Board had allowed banks to sell property damage and liability insurance and to engage in insurance sales of a more general nature.[5] The court of appeals, in canvassing the

[3]The court characterized the contest over these applications as a "commercial tug-of-war" between bank holding companies and the insurance industry and thought it best to "leave further struggle between insurance agents and these holding companies in specified areas to the marketplace" (Pet. App. 2a).

[4]"The Board's two-tier test * * * has been adopted and endorsed by every Circuit to consider the question." *Association of Bank Travel Bureaus, Inc.* v. *Board of Governors*, C.A. 7, No. 76-1186, decided January 12, 1978, slip op. 4.

[5]See, *e.g.*, *Otto Bremer Co.*, 1967 Fed. Res. Bull. 1555; *United Virginia Bancshares, Inc.*, 1970 Fed. Res. Bull. 599.

legislative history of Section 4(c)(8), demonstrated that it was not meant to prohibit any practice that was permissible under prior law (see Pet. App. 16a-21a), and the amendments to the statute consequently ratify, or at a minimum do not call into question, the Board's prior conclusion that the sale of some types of insurance is "closely related" to banking.[6]

The insurance at issue here is "closely related" to banking under any reasonable standard. The subsidiaries of the bank holding companies offer insurance pertaining to loans made by the bank and nonbank subsidiaries. One type of insurance would cover damage to the assets that secure the bank's loan; the Board and the court of appeals held that "banks have a legitimate *need* for physical damage insurance to protect the value of the collateral" (Pet. App. 31a; emphasis in original). The other type of insurance would cover the borrowers' liability for accidents associated with the collateral; the Board and the court of appeals found that "[l]iability insurance protects the borrower's ability to repay a loan, which would otherwise be destroyed by an accident or other catastrophe" (*id.* at 32a). The court of appeals also observed that borrowers find it desirable to obtain liability and property damage insurance as part of a package, and that the package as a whole not only arises out of the lending transaction but also protects the borrower's ability to repay (*id.* at 32a-33a).

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[6]See S. Rep. No. 91-1084, 91st Cong., 2d Sess. 15 (1970):

> [T]hese [insurance agency] activities are "functionally related to banking" and are included under the new provision adopted by the committee to the full extent they were permitted under the existing act, and to such additional extent as the Board may find it desirable under the new criteria established.



These considerations demonstrate that, whatever may be the case with other types of insurance—and the court of appeals did not approve every type of insurance involved in this case (see Pet. App. 24a-30a)—property damage and liability insurance are "closely related" to banking. Petitioners contend, however, that the court of appeals' treatment of the "closely related" standard conflicts with *National Courier Association* v. *Board of Governors*, 516 F. 2d 1229 (C.A. D.C.).

*National Courier* specified three criteria for identifying activities as "closely related" to banking within the meaning of Section 4(c)(8). The court indicated in the present case that it was "willing * * * to consider broader types of relationships" (Pet. App. 24a), but this does not create a conflict because the *National Courier* court never purported to exhaust the categories of "closely related" activities. Indeed, the court in *National Courier* prefaced its listing with the caveat that "*at least* the following seem to us within the statutory intent" (516 F. 2d at 1237; emphasis added). The willingness of the court here to "consider" other possibilities therefore cannot amount to the creation of a conflicting legal rule.

Nevertheless, petitioners argue (Pet. 11, 13) that "the court of appeals articulated a standard * * * almost without limitations" by stating that "the Board should be upheld when it articulates any type connection between banking and the nonbanking activity in question which makes it rational to consider the proposed activity an 'incident' to banking" (Pet. App. 31a). But the determination whether an activity is "closely related" to banking was explicitly committed by Congress in Section 4(c)(8) to the judgment of the Board. The court of appeals' statement merely acknowledges that courts should defer to interpretations of a statute by the agency charged with

its administration. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16. The *National Courier* court acknowledged the same governing principle (516 F. 2d at 1237).

2. The Board found, and the court of appeals agreed, that the provision of insurance satisfied the "public benefits" test of the statute. The court questioned the Board's conclusion that the sale of insurance would provide the public with greater convenience or with greater efficiency (Pet. App. 34a-41a). It concluded, however, that because the banks would provide the insurance service by *de novo* expansion, they would increase the competition in the insurance market and provide benefits to the public in that way (*id.* at 41a-42a). It then considered and rejected petitioners' argument that allegedly detrimental consequences of the sale of insurance by banks would outweigh the public benefits (*id.* at 42a-48a).

*a.* Petitioners do not question the court of appeals' conclusion that an increase in competition is a public benefit entitled to weight under the statute. They contend, however, that the court of appeals did not examine the Board's "public benefits" finding in the same way that, they maintain (Pet. 14-15), two other courts of appeals would have done.

Petitioners rely on *American Bancorporation, Inc.* v. *Board of Governors*, 509 F. 2d 29, 38 (C.A. 8), and *Independent Bankers Association of Georgia* v. *Board of Governors*, 516 F. 2d 1206, 1222 (C.A. D.C.). These cases state that the Board must hold hearings and scrutinize carefully the banks' specific proposals. But the Board held extensive hearings on the applications in issue here; petitioners participated in the administrative process that generated a record exceeding 3,000 pages and opinions that required 76 pages to reprint. The court of appeals



adopted the standard of the two cases on which petitioners rely, holding that only if there is a "fairly specific proposal * * * can the public interests recognized by Congress * * * receive realistic protection from the Board and the courts" (Pet. App. 49a-50a). It is difficult to understand, therefore, in what respect petitioners believe a conflict exists. The court of appeals simply applied the usual principles of administrative law to the facts of this case in determining that the proposals were sufficiently specific, and the hearings were sufficiently thorough, to withstand scrutiny.

*b.* Petitioners argue (Pet. 16) that the court of appeals, having found that two of the three grounds on which the Board relied in finding a public benefit were inadequate, should have remanded the case to the Board for further proceedings. But the court of appeals did not find that the Board's decision lacked support in the record, and neither the Board nor any court has concluded that the Board must find that more than one public benefit pertains to a particular proposal. Because the court of appeals found that none of the claimed adverse effects was reasonably likely to occur (Pet. App. 42a-48a), there would have been no point in remanding the case to the Board. A remand would have been appropriate only if the court had found that an adverse consequence was likely, and it then would have been necessary for the Board to weigh the benefits and detriments involved. Because no adverse consequence is likely, however, there is no weighing to be done. The court's conclusion that at least one public benefit is likely to occur is sufficient to sustain the Board's order.

*c.* Petitioners present a number of other contentions (Pet. 16-20), which reflect their disagreement with the Board's factual conclusions and its application of state law. These contentions do not implicate disputed legal

principles and do not call for review. See *Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283, 310.

First, petitioners argue (Pet. 16-17) that one of the applications to the Board would involve a violation of Alabama law. There is no reason for this Court to pass on questions of state law (*Bishop* v. *Wood*, 426 U.S. 341, 346). The court of appeals recognized that Alabama law would not permit a bank to operate with only one licensed insurance agent in each state, but it properly observed that the applicant "repeatedly assured the Board that it would abide by all applicable [state] licensing requirements" (Pet. App. 51a). There is no reason for the Board to assume that the applicant will not keep this promise.

Second, petitioners contend (Pet. 18-19) that the court of appeals erred in stating that there is "no unexplained conflict" (Pet. App. 41a) between the Board's conclusions and the administrative law judge's findings. But the court was correct. The Board and the administrative law judge agreed that the provision of insurance would increase competition (see Pet. App. 75a, 92a-93a, 135a-136a); they disagreed only concerning the possibility that "voluntary tying" would occur. As to this possibility, however, the court held that the Board's decision is supported by substantial evidence (Pet. App. 46a), and its disagreement with the administrative law judge is not "unexplained."

Third, petitioners argue (Pet. 20) that substantial evidence does not support the Board's conclusion that the Alabama application would produce additional competition. But the court of appeals relied on evidence in the record demonstrating that the proposal would create pressure for lower prices and that the customer-attracting advantages of one-stop shopping for loans and insurance would increase service competition (Pet. App. 24a, 42a).



This gave the Board ample reason to approve the application.[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

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[7]Petitioners' contention that the Board violated its own regulations (Pet. 17) was not presented in the court of appeals, and it is too late for petitioners to raise the argument now. In any event, it is based on the incorrect assumption that 12 C.F.R. 225.4(a)(9) makes the price at which insurance is offered the overriding consideration in the Board's public benefit determination. Nothing in the language of the regulation supports that conclusion or purports to alter the statutory listing in Section 4(c)(8) of the Act of factors to be balanced in making the public interest determination. Indeed, the regulation to which petitioners refer identifies only activities that are "closely related" to banking; it is irrelevant to the Board's separate "public benefit" determination.

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